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Nos. 87-1943 and 87-1956

In the Supreme Court of the United States

OCTOBER TERM, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MEMORANDUM FOR THE FEDERAL PARTIES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

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TABLE OF AUTHORITIES

Page

Cases:

City of Los Angeles v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986) 7

Dunagin v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984) 6

Hicks v. *Miranda*, 422 U.S. 332 (1975) 5

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 4

Kadrmas v. *Dickinson Public Schools*, No. 86-7113 (Jan. 11 & June 24, 1988) 5, 6

Metromedia, Inc. v. *San Diego*, 453 U.S. 490 (1981) 6

Oklahoma Telecasters Ass'n v. *Crisp*, 699 F.2d 490 (10th Cir. 1983), rev'd *sub nom. Capital Cities, Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984) 6

Posadas de Puerto Rico Assocs. v. *Tourism Co.*, 478 U.S. 328 (1986) 6

United States v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975) 3

Statutes and rules:

Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625 (Nov. 7, 1988) 2, 3

§ 5 2

Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) 2

§ 5, 102 Stat. 2469-2470 2

§ 7, 102 Stat. 2470-2471 2

§ 21, 102 Stat. 2486 2

18 U.S.C. 1302 ..... 2, 3, 4, 5, 7

18 U.S.C. 1307 2

28 U.S.C. 1252 5

39 U.S.C. 3001 4

39 U.S.C. (& Supp. IV) 3005 4

Fed. R. Civ. P.:

Rule 52(a) 6

Rule 56(e) 6

Rules – Continued: Page

Sup. Ct. R.:
Rule 16.1(c) 5
Rule 16.7 5
Rule 53.2 1

Miscellaneous:

R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1943

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
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No. 87-1956

ANTHONY M. FRANK,
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APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MEMORANDUM FOR THE FEDERAL PARTIES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

Appellee Minnesota Newspaper Association, Inc., has moved to dismiss the appeal taken by the government in No. 87-1956, or to vacate the judgment below, on three grounds.[1] None has merit.

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[1] Appellee has also stated that it will move to dismiss its own appeal in No. 87-1943. Under this Court's Rule 53.2, appellee is of course free to move to dismiss its own appeal for any reason. Any such motion, however, will have no effect on this one.

1. After the Court noted probable jurisdiction over our appeal in No. 87-1956, Congress enacted two new laws, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625 (Nov. 7, 1988) (the Advertising Act), and the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (the Indian Gaming Act). Contrary to appellee's contention, the recent passage of these laws has not rendered our appeal moot.

The Advertising Act adds to 18 U.S.C. 1307 certain additional exemptions from 18 U.S.C. 1302 for legal lotteries conducted by a charitable or governmental organization or by a commercial enterprise as an occasional and ancillary promotional activity. The Indian Gaming Act creates a new National Indian Gaming Commission within the Department of the Interior to regulate and supervise commercial gaming activities conducted or authorized by Indian tribes on Indian lands under ordinances adopted by the governing body of an Indian tribe and approved by the Commission Chairman. §§ 5, 7, 102 Stat. 2469-2471. Section 21 of that Act, 102 Stat. 2486, also exempts from Section 1302 "any gaming conducted by an Indian tribe pursuant to this Act."[2]

As as we noted in our opening brief (at 9), Section 5 of the Advertising Act expressly provides that the new exemptions added by that law do not take effect until 18 months after the date of their enactment, *i.e.*, until May 7, 1990.[3] Thus, appellee's member newspapers may not at

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[2] Section 21 of the Indian Gaming Act is reprinted in our opening brief (at 9a).

[3] The Act is reprinted in its entirety in the appendix to our opening brief (at 6a-9a). Section 5 provides that (*id.* at 9a): "The amendments made by this Act shall take effect 18 months after the date of the enactment of this Act." President Reagan signed the Act into law on November 7, 1988.

As we also explained in our opening brief (at 9), Congress postponed the effective date of that Act in order to give the states the op-

this time avail themselves of the additional exemptions to the prohibitions of the prize list clause of Section 1302 added by the Advertising Act. Moreover, this case would not be moot even if that law took effect immediately. The Advertising Act applies only to legal lotteries conducted by a charitable or governmental organization, or by a business as an occasional and ancillary promotional activity. It does not apply to professional gambling enterprises, such as casinos. Similarly, the Indian Gaming Act exemption applies only to authorized tribal gaming activities. Any Indian gaming activities not conducted in compliance with that Act are still subject to Section 1302. By contrast, the judgment below is not so limited. The court held the prize list clause in Section 1302 facially unconstitutional and enjoined the federal parties from enforcing that provision against any party, including the operators of an illegal numbers racket. Finally, neither Act modifies the text or meaning of the prize list clause; they simply added new exemptions to it. Accordingly, those Acts do not affect the question presented in our appeal in No. 87-1956, which involves the proper interpretation and facial constitutionality of the prize list clause.

Contrary to appellee (Mot. to Dis. 4), *United States* v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975), does not support the proposition that this case is moot. There, Congress adopted legislation after the court of ap-

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portunity to decide whether, in light of the new amendments, to prohibit lotteries altogether, or to forbid them from advertising. Accordingly, whether and how newspapers will be able to take advantage of the new exemptions is contingent on how various state legislatures (including Minnesota's) respond to Congress's invitation to reconsider their laws. That response is uncertain at present. If a state decides to prohibit lotteries, the district court's judgment would prevent the government from enforcing the prize list clause of Section 1302 against those illegal games.

peals' decision that immediately supplied the aggrieved party, a radio station seeking to broadcast winning lottery numbers in a lawful state-run lottery, with complete relief for its asserted injury. By contrast, in this case it is clear that the new legislation does not immediately supply appellee with the relief it sought. Moreover, the relief sought by appellee is broader than that afforded by the new legislation.[4] In sum, the controversy between the parties about the meaning and constitutionality of the prize list clause is still ongoing. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 426-427 n.3 (1987).[5]

2. Appellee also suggests that, in light of the two Acts discussed above, the question presented in our appeal no longer merits plenary review. Appellee, however, has overlooked the fact that this case is an appeal from a judgment by a district court holding unconstitutional an act of Congress and therefore comes within this Court's appellate

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[4] In its complaint, appellee sought a declaratory judgment that Section 1302 and 39 U.S.C. (& Supp. IV) 3001 and 3005 are unconstitutional as applied to its member newspapers "to the extent they prohibit or interfere with the publication of information about lawful gaming activities, regardless of the form." J.A. 8. In our opening brief (at 9 n.19), we gave examples of how the prize list clause would still be applicable to the publication of prize lists for lawful lotteries in appellee's member newspapers even after the Advertising Act goes into effect. Appellee concedes that the prize list clause will still apply to newspapers in those circumstances. Mot. to Dis. 3.

[5] For the reasons explained in the text, since the new laws do not modify the prize list clause in Section 1302, there is no reason for the district court to reconsider its interpretation of that clause. Accordingly, the legislation supplies no basis for vacating the district court's judgment and remanding the case to that court for it to reconsider its decision in light of the new legislation.

jurisdiction under 28 U.S.C. 1252. Accordingly, "[this Court] ha[s] no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under [this Court's] certiorari jurisdiction." *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975). This Court cannot summarily dispose of our appeal without resolving the merits of our submission.[6]

As we explained in detail in our opening brief, the court below held the prize list clause unconstitutional on the basis of a misinterpretation of its scope. When properly construed, the prize list clause in Section 1302 is a valid regulation of commercial speech promoting a lottery. Nothing in either Act cited by appellee remotely suggests that the court below properly construed the prize list clause, and appellee makes no such claim. Accordingly, neither Act supplies any basis for summarily affirming the judgment below on the ground that the question presented by our appeal is so insubstantial as to eliminate any need for further argument in this Court. Sup. Ct. R. 16.1(c).

3. Finally, appellee suggests that the judgment below should be vacated and the case remanded to the district court for development of a more complete factual record. That suggestion is not properly before the Court at this time, because it is not based on the new legislation and because it goes to the merits of the appeal. Appellee's suggestion therefore should be presented in its brief on the merits. See Sup. Ct. R. 16.7; *Kadrmas* v. *Dickinson Public Schools,* No. 86-7113 (Jan. 11, 1988) (order denying ap-

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[6] Although appellee has captioned its pleading as a motion to dismiss the appeal in No. 87-1956, the appeal in this case was taken from the judgment of a federal district court, not a state court. Sup. Ct. R. 16.1(c); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 419 (6th ed. 1986). Appellee's motion should have been styled as, and must be treated as, a motion to affirm.

pellee's motion to dismiss the appeal on estoppel and mootness grounds); *Kadrmas* v. *Dickinson Public Schools*, No. 86-7113 (June 24, 1988), slip op. 4-6 (rejecting appellee's claims in the decision on the merits of the appeal).

In any event, appellee's suggestion is meritless. The two questions before the district court were legal, not factual. The first involved the meaning of the prize list clause, which is a straightforward question of statutory construction. The second concerned the facial constitutionality of the prize list clause, as thus construed. An elaborate factual record is unnecessary to answer that issue, because the question whether a legislative restriction on commercial speech is constitutional does not ordinarily turn on questions of historic fact.[7]

Finally, appellee has overlooked the procedural posture of this case in district court. Appellee did not oppose the government's motion for summary judgment on the ground that material facts were in dispute. Fed. R. Civ. P. 56(e). On the contrary, appellee sought and received summary judgment on the basis of the affidavits and exhibits

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[7] See *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340-344 (1986) (upholding a restriction on gambling advertising in part because the legislature could reasonably have believed that it was necessary to safeguard the public welfare and would directly advance that interest); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508-509 (1981) (plurality opinion) (upholding a restriction on commercial billboard advertising by relying on the "common-sense judgments" of legislators and lower courts); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 748-749 n.8 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984) (whether a restriction on commercial speech is constitutional is not a question of fact under Fed. R. Civ. P. 52(a)); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 500-501 (10th Cir. 1983) (whether the direct advancement step of *Central Hudson* is met is not a question of fact), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

that it submitted along with its motion. J.A. 1, 14-24. Appellee may not now claim that additional factual development is necessary before this Court can decide whether the district court properly granted its own summary judgment motion.[8]

It is therefore respectfully submitted that the motion to dismiss should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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[8] Appellee therefore errs in relying (Mot. to Dis. 4) on *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986). There, the district court dismissed the plaintiff's complaint for failure to state a claim, but the court of appeals reversed. This Court upheld the court of appeals' judgment on the ground that "[t]he City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by the [cable company]." 476 U.S. at 494. In this case, by contrast, the government has not sought to defend the constitutionality of Section 1302 on the basis of disputed historic facts. In any event, it was appellee who asked for and received summary judgment in district court. If the factual record is insufficient, appellee has only itself to blame.

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